

Submission to Queensland Department of Justice and Attorney-General

**Registering life events: Recognising sex and gender diversity and same-sex families:
Review of the Births, Deaths and Marriages Registration Act 2003 (QLD)**

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Recommended citation(APA):

Galloway, K., & Gerber, P. (2018). Submission to Queensland Department of Justice and Attorney-General: Registering life events: Recognising sex and gender diversity and same-sex families: Review of the Births, Deaths and Marriages Registration Act 2003 (QLD). Castan Centre for Human Rights Law, Monash University. https://www.monash.edu/__data/assets/pdf_file/0017/1354112/QLD-Govt-submission-re-Birth-Certificates-same-sex-families-9-April-2018.pdf

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LIFE
HERITAGE
IDENTITY
FAMILY
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MEMORIES



**Registering life events:
Recognising sex and gender
diversity and same-sex families**

Review of the *Births, Deaths and Marriages
Registration Act 2003* (Qld)

Discussion Paper 1

March 2018



**Queensland
Government**

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The State of Queensland (Department of Justice and Attorney-General). Registering life events: Recognising sex and gender diversity and same-sex families. Review of the *Births, Deaths and Marriages Registration Act 2003* (Qld), Discussion Paper 1.

An electronic version of this discussion paper is available at: www.justice.qld.gov.au/bdmactreview and www.getinvolved.qld.gov.au.

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Minister's foreword

The Queensland Registry of Births Deaths and Marriages (RBDM) provides a vital and unique service to the community by collecting, recording and preserving significant life event records for all Queenslanders.

The operation of RBDM has changed considerably since the *Births, Deaths and Marriages Registration Act 2003* (Qld) (BDMR Act) commenced on 1 February 2004. Not only has RBDM modernised and revitalised its services in response to changing community needs, investment and advances in digital technology have transformed the way Queensland's registers and records are kept.



RBDM's investment in digital technology not only enables Queenslanders to access RBDM services and information quickly and easily, but more importantly, delivers the capabilities necessary to ensure the personal stories embedded within life event records are preserved for future generations. The digital repository held by RBDM now contains over 10 million life event images including almost 2 million historical images available through RBDM's family history research web service. Additionally, Queenslanders have welcomed and embraced RBDM's online services with approximately 70% of all life event registrations and 60% of all life event certificate applications submitted electronically in 2017.ⁱ

Registration services must remain relevant and responsive to community needs and expectations — both in relation to the types of registration services offered and how these services are delivered. This review of the BDMR Act provides the opportunity to examine the legislation underpinning RBDM, to simplify its operation and ensure it adequately supports the delivery of registry services in our modern and changing society.

As the Attorney-General and Minister for Justice, I am committed to ensuring that all people's sex and gender is respected and recognised in Queensland. This review provides the opportunity to respond to calls from the lesbian, gay, bisexual, transgender and intersex (LGBTI) community to consider issues for transgender and intersex people and how registration services can be effectively delivered to meet their needs.

This discussion paper, the first of three, explores how we can improve the legal recognition of sex and gender diverse people, in response to changing community attitudes and understanding about gender. With the introduction of marriage equality in December 2017 it is critical that we also ensure registration services appropriately reflect the nature of Queensland's same-sex families. As the discussion paper notes, the Government will be progressing, as a priority and separate to the review, amendments to remove the current restriction in the BDMR Act on noting in the register of births, the reassignment of a married person's sex.

Subsequent discussion papers will consider other key aspects of the legislation including the functions and powers of the Registrar of Births, Deaths and Marriages, the use and disclosure of information and the registration of life events.

Given the importance of registration services to all Queenslanders I encourage you to get involved in the review and have your say.

YVETTE D'ATH MP

Attorney-General and Minister for Justice
Leader of the House

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1. The Queensland Registry of Births, Deaths and Marriages

Compulsory registration of births, deaths and marriages began in 1856, while Queensland was still part of the colony of NSW. RBDM also holds historical registration records for:

- baptisms and burials between 1829 and 1856;
- church marriages between 1839 and 1856;
- marine birth and death records until 1920; and
- death records for service personnel who enlisted in Queensland for World War I and World War II.

In the early years of registration, the details of registrations were entered in books called 'registers'. It was the responsibility of a parent, in the case of a birth, a minister, in the case of a marriage, or the principal occupier of a house in which a death occurred, to notify the District Registrar of the details so the event could be officially registered.

Although RBDM has changed the services it offers in response to community needs, legislative requirements and digitisation, the process of registration, also called *civil registration*, has remained largely unchanged since it was first introduced. Records are still entered and retained in registers (now digital databases), following a notification.

Some of the contemporary purposes of civil registration are to:

- create a person's official identity, through the registration of their birth;
- provide evidence of the events registered (such as births, deaths, marriages, civil partnerships, changes of name, and reassignments of sex) and proof of age, identity and parentage;
- preserve life-event records for future generations; and
- collect information used for statistical, research and planning purposes relating to population, fertility, health, mortality and other matters.

The information that RBDM holds also provides a rich source of information for genealogists and professional historians.

2. The *Births, Deaths and Marriages Registration Act 2003* (Qld)

Registration services in Queensland are delivered by RBDM under the legislative framework of the BDMR Act and the BDMR Regulation.

The BDMR Act commenced on 1 February 2004 and replaced the *Registration of Births, Deaths and Marriages Act 1962*. The BDMR Act was based on a Model Law which was designed to provide nationally consistent legislation across Australian States and Territories. The Model Law was developed by the Registrars of Birth, Deaths and Marriages of each State and Territory and endorsed by the Standing Committee of Attorneys-General. Each jurisdiction adopted the Model Law in some form, with modifications to suit local conditions. A number of jurisdictions have subsequently amended their legislation in response to contemporary community needs.

The legislative framework provided by the BDMR Act and BDMR Regulation, regulates the life events that can, or must, be registered, the information that must be provided for registration purposes, the requirements to access information and the types of life event certificates that can be issued.

The BDMR Act also provides for the appointment of the Registrar-General, a Deputy Registrar-General and staff to support the proper administration of the BDMR Act.

3. Why are we reviewing the BDMR Act?

Although there have been a number of minor and/or technical amendments to the BDMR Act and BDMR Regulation, the legislation has not been comprehensively reviewed since commencement. With significant changes in technology and society over this time, it is important to ensure that the legislation that underpins so many of life's major milestones remains relevant.

4. What is the aim of the review?

The aim of the review is to determine whether the current provisions of the BDMR Act remain appropriate. In particular, the review aims to identify opportunities to simplify the operation of the BDMR Act and ensure it provides a contemporary legislative framework to:

- facilitate the ongoing relevancy, efficiency and effectiveness of RBDM in delivering services to meet current and emerging community needs;
- ensure the effective collection, administration, protection, and dissemination of statistical and identity information; and
- enable advances in the delivery of, and access to, digital services and the commercialisation of certain RBDM products and services.

5. Marriage Equality

From 9 December 2017, all Australians regardless of sex or gender have the right to be married in Australia. Marriage equality is a result of the commencement of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cwth).

Separate to the review of the BDMR Act, the Government will be progressing as a priority amendments to remove the current restriction in the BDMR Act on noting the reassignment of a married person's sex on the register of births (discussed further at section 9).

Other amendments may need to be made to Queensland legislation consequential to the introduction of marriage equality. These will be considered separate to the review.

6. How do I provide my views on this discussion paper?

We are seeking your views on the questions outlined in this discussion paper. The closing date for submissions is **19 April 2018**. You are invited to provide your written submission or response to the discussion paper by:

Email

bdmlegislativereview@justice.qld.gov.au

Post

BDM Act Review Team
PO Box 15188
City East, Brisbane QLD 4002

Online

www.getinvolved.qld.gov.au.

Privacy statement

Any personal information included in your submission will be collected by DJAG for the purpose of the review of the BDMR Act. The information will be collected, used, stored and

disclosed in accordance with the *Information Privacy Act 2009*. DJAG may contact you for further information about your submission.

DJAG may use the content of your submission in documents which are to be made public or given to other entities involved in the review. This could include quoting from, or referring to, your submission in its documents (for example, the report about this review). The Attorney-General may refer to, or quote from, submissions in Parliament and in other public forums.

Submissions may also be published on DJAG's website, although individuals' personal addresses and contact details will be removed from submissions before this occurs. DJAG will not publish submissions that breach applicable laws, contain offensive language or defamatory comments, or which do not substantively comment on relevant issues.

Your submission (or information about its content) may also be released to other government agencies as part of the consultation process. It may also be provided to any Parliamentary Committee that considers legislation resulting from this review. Further information about the work of Parliamentary Committees, including how they deal with submissions, is available at <http://www.parliament.qld.gov.au/work-of-committees>.

If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Abbreviations and terminology

ACT	Australian Capital Territory
BDMR Act	<i>Births, Deaths and Marriages Registration Act 2003</i> (Qld)
BDMR Regulation	<i>Births, Deaths and Marriages Registration Regulation 2015</i> (Qld)
NSW	New South Wales
NT	Northern Territory
Registrar	Registrar-General, Registry of Births, Deaths and Marriages (Qld)
RBDM	Registry of Births, Deaths and Marriages (Qld)
SA	South Australia
TAS	Tasmania
VIC	Victoria
WA	Western Australia

Terminology used in this paper

Gender is part of a person's social and personal identity. It refers to each person's deeply felt internal and individual identity and the way a person presents and is recognised within the community. A person's gender refers to outward social markers, including their name, outward appearance, mannerisms and dress. A person's sex and gender may not necessarily be the same.

Intersex refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female'. Intersex people have a diversity of bodies and identities.

A person of **indeterminate** sex or gender is either someone whose biological sex cannot be unambiguously determined or someone who identifies as neither male nor female.

Sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex.

Transgender is a general term for a person whose gender is different to their sex at birth.

Based on Australian Government. (July 2013 updated November 2015). *Australian Guidelines on the recognition of sex and gender*. Retrieved January, 2017, from <https://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>

7. The purpose of this discussion paper

In late 2013, DJAG commenced a review of the BDMR Act and invited key stakeholders to submit comments on issues that should be considered as part of the review. In response, 34 submissions were received.

A number of submissions raised concerns about what are considered to be the present limitations of the BDMR Act for the legal recognition of sex and gender diverse people living in Queensland. Submissions also called for greater recognition of same-sex families. This is now even more relevant with the introduction of marriage equality in December 2017.

This discussion paper is based on the feedback received and other issues independently identified by DJAG. It considers whether legislative and/or administrative changes are needed to improve the recognition of sex and gender diverse Queenslanders and reflect the nature of modern family relationships. Specifically the paper examines three main issues:

1. collecting and registering a person's sex;
2. recording the reassignment of a person's sex; and
3. recording same-sex families on the register.

8. Collecting and registering a person's sex

Although the terms 'sex' and 'gender' are often used interchangeably in common usage, administrative processes and legislation in Queensland, there are important distinctions between the two concepts. Sex relates to a person's anatomical characteristics whereas gender refers to a person's social and personal identity and the way a person presents and is recognised in the communityⁱⁱ.

The BDMR Regulation prescribes the information that must be included in an application for registration and what information must be included on a certificate. This includes information for the recording of a person's sex on their record of birth (birth registration) and on their birth certificate. The term 'sex' is not defined in the BDMR Act or the BDMR Regulation.

The current administrative practice of the Registrar is to collect sex on the application for birth and death registration forms and register the individual as either 'male' or 'female'. The only exception to this practice is where an application for birth and/or death registration is received for a stillborn child and the sex is unable to be determined. In that instance the sex may be recorded as 'indeterminate'.

The BDMR Act provides that a person's entry in the birth register or adopted children register can only be altered to recognise a person's reassigned sex, if the person has undergone sexual reassignment surgery and if the person is not married. (*See section 2. for further discussion on recording the reassignment of a person's sex*).

Due to recent changes to the *Marriage Act 1961* (Cth) (Marriage Act) to enable same-sex marriages, Notices of Intended Marriage (NOIM) now require the collection of the couple's sex. The changes to the NOIM (which are consistent with the Australian Guidelines on the recognition of sex and gender), provide that the parties can be registered as male, female or X (indeterminate, intersex or unspecified).

Issues

Concerns have been raised by some members of the LGBTI community and other stakeholders about the perceived present limitations of the BDMR Act in terms of the legal recognition of sex and gender diverse people living in Queensland. Sex and gender diverse people are individuals whose gender identity or expression does not match the sex assigned to them at birth (such as transgender people) and people who have physical, hormonal or genetic features which mean they are not exclusively male or female (also referred to as intersex people).

Concerns have also been raised that under the BDMR Act birth and death registrations do not currently provide for the recognition of people of indeterminate sex or who identify as non-binary, that is, those people who do not identify with the gender descriptors of male or female.

Calls have been made to include either another category of sex to allow individuals to self-identify their sex or gender when registering a life event or to choose their sex or gender from a range of additional categories of sex such as 'non-binary', 'unspecified', 'non-specific', 'indeterminate' or 'intersex'.

Developments in other jurisdictions

The High Court in the 2013 decision of *New South Wales Registrar of Births, Deaths and Marriages v Norrie*, held that the NSW *Births, Deaths and Marriages Act 1995* (NSW Act) permitted the registration of a person's sex as 'non-specific'. The applicant, in that case, had undergone a sex affirmation procedure and remained of indeterminate sex (that is,

neither male nor female)ⁱⁱⁱ, and had applied to the Registrar under the NSW Act to register a change of sex to 'non-specific' and a change of name. In accordance with this decision the NSW Registry of Births, Deaths and Marriages introduced an additional sex category of 'non-specific'.

In 2014 changes were made to the registration process in the Registry of Births, Deaths and Marriages in the ACT to allow for the recording of a person's sex in the birth register, or after a change of sex, as 'male', 'female', 'unspecified', 'indeterminate' or 'intersex'.^{iv}

Similarly, recent legislative changes were made in SA to enable the registration of a change of sex or gender identity to recognise the following categories of sex or gender identity – 'male', 'female', 'non-binary' and 'indeterminate / intersex / unspecified'.^v

The NT Registry of Births, Deaths and Marriages has also introduced changes to allow the following categories of sex to be registered for births and deaths: 'male', 'female'; 'indetermined', 'other' and 'unknown'.

Tell us your views:

1. How should a person's sex be recorded on the birth, adoption and death registers?

For example:

Should other categories such as non-binary, unspecified, indeterminate, and intersex be used to record a person's sex or gender or should another category be introduced to allow a person to self-identify their sex or gender?

2. Do you have any other comments on this issue?

9. Recording the reassignment of a person's sex

The registration of a person's birth creates their official identity. The birth certificate is the primary identity document that enables individuals to exercise their civil rights and responsibilities such as enrolling in school, opening a bank account, obtaining a passport and/or driver licence, enrolling to vote and accessing benefits and services.

Part 4 of the BDMR Act contains provisions that govern the reassignment of a person's sex on their birth registration in Queensland. Section 22 provides that the reassignment of a person's sex may be noted in the person's entry in the register of births or adopted children register *after the person has undergone sexual reassignment surgery* and only if the person is *not married*.

Sexual reassignment surgery is defined in the BDMR Act to mean a surgical procedure involving the alteration of a person's reproductive organs carried out to help the person to be considered to be a member of the opposite sex; or to correct or eliminate ambiguities about the sex of the person (Schedule 2).

An application to have the reassignment of the person's sex noted in the register can be made by the person, if they are an adult, or, in the case of a child, by the child's parents, one of the child's parents (if certain criteria are met) or the child's guardians.

The application must include either statutory declarations by two doctors verifying that the person has undergone sexual reassignment surgery, or 'a recognition certificate' (which is a certificate issued under the law of another State or Territory that identifies the person as having undergone such surgery and being the sex stated in the certificate).

The application must also include the information and documents prescribed in section 12(2) of the BDMR Regulation including:

- identification documents;
- a document verifying the relationship between the child and his or her parents or guardians (if requested by the Registrar);
- evidence of any other former names (if requested by the Registrar); and
- if the person was married, evidence of the death of the person's last husband or wife or of the dissolution of the marriage.

If the reassignment of a person's sex is noted under the BDMR Act, the person is legally a person of that sex.

Issues

Under the BDMR Act, the recognition of people who have reassigned their sex currently excludes transgender people who have undergone some surgical procedures, for example breast implants or a double mastectomy, or non-surgical medical or clinical treatment rather than a surgical procedure to alter their reproductive organs. Feedback was received from transgender advocates and other stakeholders that surgery should be a matter of individual choice and not a requirement for the legal recognition of a person's sex or gender identity.

Concerns have been raised about the type and volume of medical evidence required under the BDMR Act to satisfy the requirements for a reassignment of sex, and potential difficulties for people to gather such evidence. Other issues raised include that the existing process to have their sex reassigned is more difficult for children and young people under 18; and that people who are married are ineligible to apply. It was also suggested by some, that intersex people should have the ability to change their sex later in life without the need for surgical interventions.

Currently the BDMR Act does not allow the RBDM to alter a person's sex on the birth register if the person is married. While this restriction reflected the previous inability of persons of the same-sex to be married, given the introduction of marriage equality on 9 December 2017, it should now be removed.

As discussed above (in Section 5) separate to the review of the BDMR Act, the Government will be progressing as a priority amendments to remove the current restriction in the BDMR Act on noting the reassignment of a married person's sex on the register of births.

Other amendments may need to be made to Queensland legislation consequential to the introduction of marriage equality. These will be considered separate to the review.

Stakeholders have also raised concerns that Queensland law does not currently provide legal recognition of sex or gender identity of transgender people who reside in Queensland but whose birth was registered elsewhere. In these circumstances, a number of jurisdictions issue a recognised details certificate (under certain conditions) to provide a person with an official recognition of their change of sex. There have been calls for Queensland law to provide for the issuing of a certificate that acknowledges a person's name and sex or gender.

Developments in other jurisdictions

All Australian jurisdictions provide for the reassignment of a person's sex to be recognised, although there are differences between States and Territories as to the type of intervention that is required to reassign a person's sex on their record of birth registration.

Key differences across the jurisdictions include:

- whether the person is required to have undergone a surgical procedure to alter their reproductive organs or clinical or hormonal treatment;
- the requirements for changing the sex of children under 18;
- whether an application can be made by a person who was born outside the State or Territory and/or whether the person resides in the State or Territory where an application is made and their length of residency;
- whether people are recorded as a sex or gender other than 'male' or 'female';
- whether the registry recognises a certificate (recognised details certificate) from another State or Territory as proof of a person's change of sex;
- differences in the level of medical evidence required to support an application; and
- whether the Registry will issue a certificate containing details of a person's sex which can be used as proof of a person's sex or gender.


Tell us your views:

- 3. Should any changes be considered to the BDMR Act and BDMR Regulation to improve the legal recognition of sex and gender diverse people in Queensland? If so, what should the changes be?**

For example:

Should changes be made to the current requirement for a person to have undergone 'sexual reassignment surgery' before the register is permitted to note a reassignment of sex in the person's record of birth?

- 4. Should any changes be made to the BDMR Act's provisions regarding an application to note a reassignment of sex for children/young people under the age of 18? If so, what should the changes be?**

- 
5. **Should the BDMR Act contain provisions to allow for the reassignment of a person's sex for individuals who reside in Queensland but whose birth was registered elsewhere?**
 6. **Should the BDMR Act allow for the issuing of a gender recognition certificate / identity acknowledgement certificate which can be used by a person as proof of their sex or gender?**
 7. **Do you have any other comments on this issue?**

10. Recording same-sex families on the register

Section 10A of the BDMR Act states that on a birth registration, adoption registration or a change of parentage under a parentage order (surrogacy order), not more than one person may be registered as the child's mother or father and not more than two people in total may be registered as the child's parents. The BDMR Regulation (Schedule 1) provides that a person who is not registered as the 'father' or 'mother' of the child may be listed on the birth entry as a 'parent'.

In the case of same-sex parents one person may be recorded as either the 'mother' or the 'father' of the child and the other person is recorded as 'parent'. Currently, parents may not be recorded both as 'mother' or both as 'father' on the register, nor can both be referred to by the gender neutral term 'parent'.

Issues

There have been calls for the BDMR Act to recognise same-sex families by permitting parents to decide how they are described on the birth or adoption registration. Suggestions have been made that parents should be able to describe themselves as both, or either 'mother' or 'father' or 'parent'.

As noted above under the BDMR Act only two people can be registered as a child's parents. The issue of whether or not a child's birth or adoption registration should include more than two parents and the issuing of integrated birth certificates listing more than two parents will be canvassed in a subsequent discussion paper.

Developments in other jurisdictions

A number of jurisdictions allow parents to choose how they want to be described on the birth or adoption registration for example 'birth mother'/'mother', 'birth parent'/'other parent/second parent/co-parent', 'mother'/'mother', 'mother'/'parent', 'father/father', 'father'/'parent' or 'parent'/'parent'.

Tell us your views:

8. Should the BDMR Act be amended to permit same-sex parents to choose how they are recorded on a birth or adoption registration?

9. If so, what descriptors should be available and in what combinations?

For example:
mother/mother or father/father

10. Do you have any other comments on this issue?

ⁱ RBDM unpublished data as at October 2017.

ⁱⁱ Australian Government. (July 2013 updated November 2015). *Australian Guidelines on the recognition of sex and gender*. Retrieved January 2018, from <https://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>

ⁱⁱⁱ High Court of Australia. Case S273/2013. *NSW Registrar of Births, Deaths and Marriages v. Norrie*. Retrieved January 2018, from http://www.hcourt.gov.au/cases/case_s273-2013

^{iv} ACT Government, Registry of Births Deaths and Marriages, Application to Alter Birth register to record change of sex, retrieved October 2017, from https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691#!tabs-3

^v South Australia. *Births, Deaths and Marriages Registration Regulations 2011*. Part 3A Registration of change of sex or gender identity, Section 7A Recognised sex or gender identity.